84-717

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD C. LUSSY,
Plaintiff/Appellant,

— v —

MARK S. DAVIDSON, and the law firm of WILLIAMS, LANZA, KASTNER & GIBBS; ARDEN C. McCLELLAND and the law firm of McCLELLAND LAW OFFICES, P.C.,
Defendants/Respondents

On Appeal from the Supreme Court of Montana

Motion to Dismiss and/or Affirm as Appropriate

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vs.

MARK S. DAVIDSON, and the law firm of WILLIAMS, LANZA, KASTNER & GIBBS; ARDEN C. McCLELLAND and the law firm of McCLELLAND LAW OFFICES, P.C., *Defendants/Respondents*

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I.
INTRODUCTION

Respondents submit that the appeal lodged herein is not within the jurisdiction of the United States Supreme Court because it was not taken in conformity with the applicable statutes or with the rules of this court; that the case does not present a substantial federal question and that the federal question sought to be reviewed was neither timely nor properly raised in the courts below; and that the judgment below rests upon adequate non-federal basis.

II.
STATEMENT OF THE CASE

Appellant filed a legal malpractice action against two attorneys who had represented the appellant in security fraud, slander and other litigation in Montana. The mal-

practice action was initially filed in King County, Washington, then voluntarily dismissed and refiled in Deer Lodge County, Montana. Respondents filed motions for summary judgment, which motions were granted following discovery, oral argument and briefing.

Appellant pursued an appeal to the Supreme Court of Montana. After briefing the Supreme Court of Montana entered a per curiam order dated February 29, 1984, holding the appeal to be frivolous and lacking in merit, and that it was dismissed summarily. Notice of appeal to the United States Supreme Court was timely filed on March 13, 1984. The federal question, raised upon the present appeal, was never raised during any of the proceedings below.

III.
THERE ARE NO SUBSTANTIAL FEDERAL QUESTIONS

Respondents submit the present case is not one which is properly before this court by reason of appeal. 28 U.S.C. §1257. This ground alone warrants dismissal of the present appeal.

Moreover, even if the present proceeding is treated as an application for a writ of certiorari, the writ should be denied and the lower court judgment affirmed. Several reasons support such result.

First, Appellant has framed the question as one being whether in a civil proceeding a party has a Sixth Amendment right to the effective assistance of counsel. Second, Appellant contends the Supreme Court of Montana was deprived of its ability to function because Appellant had instituted suit against members of the Supreme Court of Montana, although none of the individuals sued by the Appellant participated in the rendition of the per curiam order.

Neither issue raised here was ever raised below. Rule 15(1)(d), United States Supreme Court, requires the Appellant to demonstrate that the federal questions sought to be reviewed were raised below. In fact, however, neither the Sixth Amendment claim, nor the claim that the Supreme Court of Montana could not function at all were raised in pleadings, briefs or motions below. As such these matters cannot be raised for the first time before this court.

Moreover, the issues raised lack merit. The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Amendment on its face is restricted to criminal proceedings. An individual has no similar claim to the constitutionally protected right to the effective assistance of counsel in a civil proceeding. *Massiah v. U.S.*, 1964, 377 U.S. 201, 204, 205, 84 S.Ct. 1199, 12 L.Ed.2d 246, 250.

Appellant's reliance upon *U.S. v. Cronic*, 675 F.2d 1126 (10th Cir. 1984) is misplaced. *Cronic*, *supra*, was a criminal proceeding, unlike the present civil proceeding. As a consequence, no constitutional right has been established by the Appellant and no constitutional right of the Appellant has been violated by the lower court proceedings.

The underlying issue urged throughout the civil procedure conducted before the district and the Supreme

Court of Montana was that when the Appellant defamed another person by accusing that person of criminal acts, the Respondents, as attorneys representing the Appellant in such proceeding, should have offered evidence of events which occurred after the utterance of the slander to prove the truth of the statement uttered. The evidence relied upon by Appellant is specifically barred from consideration by application of Comment g, *Restatement of Torts 2d*, § 581A. The state courts have properly ruled that no substantive fact issues have been raised preventing summary judgment resolution of the legal malpractice action.

Appellant raises a second "federal issue" essentially asserting that since he has sued some members of the Supreme Court of Montana, none of the members of the court could render any decision upon his appeal. This argument lacks merit. The per curiam order was signed only by court members then not sued by Lussy. Since the Supreme Court of Montana decision below, Appellant has brought further litigation against the State district judge and other members of the Supreme Court who participated in deciding against the Appellant.

There is no authority for the proposition advanced. Lussy seeks, through continued litigation, to disqualify the members of the Supreme Court of Montana from functioning at all. Filing of lawsuits is being used by Appellant as a device to prevent the entry of any judgment adverse to the Appellant's interest. The fact remains that members of the Supreme Court of Montana who participated and signed the per curiam dismissal were then not defendants in any litigation filed by the Appellant. The Appellant's second issue lacks substance.

IV.
CONCLUSION

The present appeal should be dismissed and/or the lower court's order affirmed.

Respectfully Submitted this 20th day of June, 1984.

GOUGH, SHANAHAN,
JOHNSON & WATERMAN

Ronald F. Waterman

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CERTIFICATE OF SERVICE

I, Ronald F. Waterman, counsel of record for Mark S. Davidson, and the law firm of Williams, Lanza, Kastner & Gibbs; Arden C. McClelland and the law firm of McClelland Law Offices, P.C., and a member of the Bar of the Supreme Court of the United States, hereby state that on the _____ day of June, 1984, I served three copies each of the Motion to Dismiss and/or Affirm as Appropriate on each of the parties to the above-entitled action, as follows:

1. On Richard C. Lussy, by mailing three copies of the document in a duly addressed envelope, with first-class postage prepaid, to Richard C. Lussy, Esq., 2565 Magnolia Blvd. W., Seattle, WA 98199.

It is further certified that all parties required to be served have been served, and the list of such parties is set forth above.

Ronald F. Waterman
Attorney for Mark S. Davidson, and the law firm of Williams, Lanza, Kastner & Gibbs; Arden C. McClelland and the law firm of McClelland Law Offices, P.C.
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